IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Michael Lopez,	)	
	)	Case No.: 09 C 3349
Plaintiff,	)	
	)	Judge Feinerman
v.	)	
	)	Magistrate Finnegan
CITY OF CHICAGO, et. al.,	)	
	)	
	)	
Defendants.	)	JURY DEMANDED

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR PARTIAL MOTION FOR SUMMARY JUDGMENT

Defendants Vito Ricciardi, Benito Lugo ("Defendants Officers"), and the City of Chicago (collectively "Defendants"), by and through their attorneys, respectfully submit this memorandum of law in support of their partial motion for summary judgment on Counts I, III, V, and VI of Plaintiff's Amended Complaint, and state as follows:

INTRODUCTION[1]

On January 19, 2008 at about 4:00 a.m., Michael Lopez ("Plaintiff") went over to the apartment of Steven Fouts. Plaintiff, Melanie Lopez, who is Plaintiff's estranged wife, and Mr. Fouts were in the apartment drinking beers for a few hours. During that time, a verbal altercation broke out between Plaintiff and Ms. Lopez. Ms. Lopez and Mr. Fouts both repeatedly asked Michael Lopez to leave; however, Michael Lopez refused to leave. Eventually, Ms. Lopez called 911 because she wanted Plaintiff to leave the apartment.

Based on Ms. Lopez's 911 call, Chicago Police Officers Vito Ricciardi and Benito Lugo ("Defendant Officers"), received a dispatch on their police radio and were told that there was a

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1 Consistent with Fed. R. Civ. P. 56, the facts in this memorandum are taken in light most favorable to Plaintiff and are not an admission for any other purpose.

domestic disturbance involving a hammer at 3643 N. Pulaski. Upon their arrival, Defendant Officers saw Plaintiff leaving the apartment building. They approached Plaintiff brought him into the lobby for further investigation. Officers went upstairs and spoke with Mr. Fouts and Ms. Lopez. Mr. Fouts and Ms. Lopez told Defendant Officer Ricciardi that Michael Lopez was asked to leave, but refused.

When Defendant Officer Ricciardi returned to the lobby of the apartment building, he instructed Plaintiff to leave the building. At this point, Plaintiff alleges that Defendant Officer Ricciardi, infuriated by a joke Plaintiff made, grabbed him by his left shoulder or arm and swung him into the wall where Plaintiff hit his head. At this time, Defendant Officer Lugo was standing to Plaintiff's right. No force was alleged against Defendant Officer Lugo and no other force was alleged against Defendant Officer Ricciardi.

Defendants are entitled to summary judgment on Plaintiff's false arrest claim because, given the information Defendant Officers received from the police dispatcher, Mr. Fouts and Ms. Lopez, and their personal observations, they had probable cause to arrest Plaintiff for criminal trespass. 720 ILCS 5/21-3(a)(3); *Kelley v. Myler*, 149 F.3d 641 (7th Cir. 1998). While Defendants are not moving for summary judgment on Plaintiff's excessive force claim alleged against Defendant Officer Ricciardi, Defendant Officer Lugo is entitled to summary judgment on Plaintiff's failure to intervene claim because the alleged force happened in a split-second, which did not afford Defendant Officer Lugo with a reasonable opportunity to intervene. *Lanigan v. Village of East Hazel Crest,* 110 F.3d 467, 478 (7th Cir. 1997); *Smith v. Boyle*, No. 02 C 2788, 2004 WL 2203438 at * 4 (N.D. Ill. Sept. 29, 2004) (Anderson, J.). Finally, Defendants are entitled to summary judgment on Plaintiff's malicious prosecution claim because Plaintiff has not produced evidence that his resisting arrest charges were dismissed in a manner indicative of his innocence, nor that the Defendant Officers lacked probable cause to charge him with resisting arrest. *O'Neill v. City of Chicago*, No. 01 C 6500, 2002 WL 31133188 at * 9 (N.D. Ill. Sept. 25, 2002) (Holderman, J.); *Ferguson v. City of Chicago*, 213 Ill.2d 94, 101, 289 Ill.Dec. 679, 684,820 N.E.2d 455, 460 (Ill. 2004).

STATEMENT OF FACTS

The statement of facts in Defendants' Local Rule 56.1 (a)(3) Statement of Uncontested Facts ("Def.'s 56.1") filed contemporaneously and hereby incorporated by reference.

STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." To determine whether a genuine issue of material fact exists, the court "must view all evidence and inferences in light most favorable to the nonmoving party." *Sandra T.E. v. Sperlik*, 639 F.Supp.2d 912, 918 (N.D. Ill. 2009) (*citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986)).

Once a motion for summary judgment has been made and properly supported by the moving party, "the nonmoving party must then 'go beyond the pleadings' and 'designate specific facts showing that there is a genuine [material] issue for trial.'" *Id*. (*quoting Anderson*, 477 U.S. at 248 (1986)). An issue of material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *UPS Supply Chain Solutions, Inc. v. American Airlines, Inc.,* 646 F.2d 1011, 1013 (N.D. Ill. 2009) (*quoting Anderson*, 477 U.S. at 249). A party will be successful in opposing summary judgment only if it presents "definite, competent evidence to rebut the motion." *EEOC v. Sears, Roebuck & Co.,* 233 F.3d

432, 437 (7th Cir. 2002). The existence of a factual dispute will not bar summary judgment, unless the disputed fact is outcome determinative under governing law. *Contreras v. City of Chicago*, 119 F.3d 1286, 1291-92 (7th Cir. 1997).

ARGUMENT

I. PLAINTIFF'S CLAIM OF FALSE ARREST FAILS BECAUSE PROBABLE CAUSE EXISTED.

Defendant Officers Ricciardi and Lugo had probable cause to arrest Plaintiff for criminally trespassing on Mr. Fouts' property. *See infra*, I.A-C. It is well established that the existence of probable cause for an arrest is an absolute bar to a § 1983 claim for false arrest. *Mustafa v. City of Chicago*, 442 F.3d 544, 547 (7th Cir. 2006); *Fernandez v. Perez*, 937 F.2d 368, 370 (7th Cir. 1991); *Schertz v. Waupaca County,* 875 F.2d 578, 582 (7th Cir. 1989); *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091 (2007). A police officer has probable cause to arrest an individual when "the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1246 (7th Cir. 1994). "Probable cause is 'a state of facts that would lead a person of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested committed the offense charged.'" *Swearnigen-El v. Cook County Sheriff's Dept.,* 602 F.3d 852, 863 (7th Cir. 2010) (*quoting Ross v. Mauro Chevrolet*, 369 Ill.App.3d 794, 801 (2006)). Probable cause "requires more than a bare suspicion of criminal activity;" however, evidence sufficient to support a conviction is not necessary. *Woods v. City of Chicago,* 234 F.3d 979, 996 (7th Cir. 2000).

A. Defendant Officers Had Probable Cause To Arrest Plaintiff For Criminal Trespass Based On What Mr. Fouts Told Them.

In order to defeat Defendant Officers motion for summary judgment for the false arrest claim, Plaintiff "must present sufficient evidence that would allow a jury to conclude" that Defendant Officers unreasonably believed that Plaintiff had committed the offense of criminal trespass. *Reynolds v. Jamison*, 488 F.3d 756, 765 (7th Cir. 2007). Here, Plaintiff has not met this burden.

Under Illinois law, a person commits criminal trespass when he "remains upon the land of another, after receiving notice from the owner or occupant to depart." 720 ILCS 5/21-3(a)(3). Probable cause exists when an officer has "established cause on every element of a crime;" therefore, no further investigation is required by the officer. *Kelley v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998). Also, a complaint by a putative victim is sufficient to establish probable cause. *Reynolds,* 488 F.3d at 765.

It is undisputed that Mr. Fouts and Ms. Lopez told Plaintiff to leave Mr. Fouts' apartment numerous times. (Def.'s 56.1 ¶ 10). However, Plaintiff refused to leave until Melanie Lopez called "911." (Def.'s 56.1 ¶¶ 11, 12, 17). Defendant Officers received information from dispatch that there was a domestic disturbance involving a hammer at 3643 N. Pulaski. (Def.'s 56.1 ¶ 20). Upon arriving at the scene, Defendant Officers saw Plaintiff exit the building and met him while he was still physically within the apartment's courtyard. (Def.'s 56.1 ¶¶ 21, 22).

Plaintiff admitted to Defendant Officers that he had been asked to leave the building. (Def.'s 56.1 ¶ 16). Mr. Fouts and Ms. Lopez told Defendant Officer Ricciardi that Plaintiff was asked to leave, but refused. (Def.'s 56.1 ¶ 30). At that point, Defendant Officers had probable cause to arrest Plaintiff for committing criminal trespass. (Def.'s 56.1 ¶¶ 29, 30)[2]. According to Illinois law, Plaintiff committed criminal trespass when he remained in Mr. Fouts' apartment after he was asked to leave. 720 ILCS 5/21-3(a)(3). The violation of Illinois law by Plaintiff was known to the Defendant Officers prior to Plaintiff's arrest. (Def.'s 56.1 ¶¶ 29, 30, 34). Based on these facts Defendant Officers had probable cause to arrest Plaintiff for criminal trespass; therefore, Plaintiff's false arrest claim fails as a matter of law.

B. The Fact that Mr. Fouts Signed a Blank Criminal Complaint Does Not Abate the Existence of Probable Cause.

In order to defeat summary judgment, Defendants anticipate that Plaintiff will rely heavily on Mr. Fouts' testimony that he signed a blank criminal complaint. (Def.'s 56.1 ¶¶ 32, 33). The allegation about the criminal complaint does not abate the unquestionable probable cause to arrest that existed before Plaintiff's arrest.

"In a suit under §1983 the plaintiff must show a violation of the Constitution or laws of the United States, not just a violation of state law." *Gramenos v. Jewel Companies, Inc.,* 797 F.2d 432, 434 (7th Cir. 1986). "No principle of federal law makes a properly attested complaint necessary to an arrest or a criminal prosecution. *Gramenos v. Jewel Companies, Inc.,* 797 F.2d 432, 434 (7th Cir. 1986). According to Illinois law and the Seventh Circuit's holding in *Gramenos,* Defendant Officers did not lack probable cause to arrest Plaintiff because Mr. Fouts signed a blank criminal complaint. Therefore, Plaintiff's false arrest claim fails, and summary judgment on this claim should be granted in favor of the Defendants.

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[2] The fact that Ms. Lopez stated that they did not want Plaintiff arrested is inconsequential because they gave police information that formed probable cause to arrest Michael Lopez for committing the offense of criminal trespass to land.

C. Alternatively, Defendant Officers are Entitled to Qualified Immunity on Plaintiff's False Arrest Claim.

Under the doctrine of qualified immunity, public officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)(citations omitted). The issue of qualified immunity is a question of law for the court to decide. *Alvarado v. Picur*, 859 F.2d 448, 450 (7th Cir. 1988). A two-fold analysis is used to determine if an officer is entitled to qualified immunity. First, it must be determined if the "facts show that the official violated a constitutional right." *T.E. v. Grindle*, 599 F.3d 583, 587 (7th Cir. 2010). Second, if they do, it is determined "whether the violated right was clearly established at the time of the alleged violation." *Id*.

With respect to the second prong of the test, the court evaluates whether the law was clear in relation to the specific facts confronting the officer at the time he acted. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also, Lanigan v. Village of East Hazel Crest, Ill*., 110 F.3d 467, 472 (7th Cir. 1997); *Pearson v. Callahan*, 129 S.Ct. 808 (2009) (courts not bound to analyze qualified immunity question in rigid order). Although qualified immunity is a defense to a §1983 suit, plaintiff bears the burden of establishing the elements of this two-part test. *Spiegel*, 196 F.3d at 723. If Plaintiff attempts to dispute Defendant Officers' qualified immunity argument, he must identify some authority explaining how Defendants were acting contrary to clearly established laws on the specific facts confronting them and the information the possessed at the time when they arrested Plaintiff. *Id*.

In *Kelley v. Myler*, the plaintiff was protesting outside of a restaurant establishment when she was asked to leave the property, but refused. 149 F.3d at 644. The restaurant manager called the police, and when the defendant officers arrived, he observed the plaintiff walking around the restaurant's parking lot. *Id.* The defendant officers asked the plaintiff to leave and the plaintiff refused stating that she was on an easement for the use of the general public. *Id*. The defendant officers arrested the plaintiff for criminal trespassing, but the plaintiff was found not guilty because the plaintiff was in fact on a public-right-of-way. *Id*.

The court granted the defendant officers qualified immunity on the plaintiff's false arrest claim. *Id*. at 648. The court reasoned that because "a reasonable officer could have believed that [the plaintiff] had committed the offense of trespass, the [defendant officers] were not acting contrary to clearly established law when they arrested [the plaintiff]" *Id.*

In *O'Neill v. City of Chicago*, the court held that the defendant officer was entitled to qualified immunity because neither the plaintiff nor the court could find any case law that would put the defendant officer on notice that "filling out blank complaint forms after the complainant had signed them" violated the plaintiff's constitutional rights. No. 01 C 6500, 2002 WL 31133188 at * 8 (N.D. Ill. Sept. 25, 2002) (Holderman, J.).

Similar to the defendant officers in *Kelly*, Defendant Officers Ricciardi and Lugo reasonably believed that Plaintiff committed criminal trespass before they arrested him. Mr. Fouts and Ms. Lopez told Defendant Officer Ricciardi that Plaintiff refused to leave the apartment after they told him to leave. (Def.'s 56.1 ¶ 30). Also, like the defendant officer in *O'Neill*, Defendant Officers were not on notice that having Mr. Fouts sign a blank complaint was a violation of Plaintiff's constitutional rights. (Def.'s 56.1 ¶¶ 32, 33). Therefore, Defendant Officers are entitled to qualified immunity on Plaintiff's false arrest claim.

II. THE FAILURE TO INTERVENE CLAIM AGAINST OFFICER LUGO FAILS BECAUSE HE DID NOT HAVE A REALISTIC OPPORTUNITY TO PREVENT THE ALLEGED USE OF EXCESSIVE FORCE.

Defendant Lugo is entitled to summary judgment because he did not have a realistic opportunity to intervene to prevent Officer Ricciardi from using the force alleged. An officer is under a duty to prevent the use of excessive force on an arrestee when the officer knows excessive force is being used and has a realistic opportunity to prevent its use. *Montano v. City of Chicago*, 535 F.3d 558, 569 (7th Cir. 2008) (*citing Morfin v. City of East Chicago*, 349 F.3d 989, 1001 (7th Cir.2003); *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir.1994)). "Failure to intervene must be intentional and not merely the negligent failure to perceive a constitutional violation." *Stepney v. City of Chicago*, No. 07 C 5842, 2010 WL 4226525 at * 6 (N.D. Ill., Oct. 20, 2010) (Zagel, J.) (*citing Rascon v. Hardiman*, 803 F.2d 269, 276 (7th Cir. 1986). Also, for an officer to have a realistic opportunity to intervene, that officer must be able to '"call for back up, call for help,'" or at least caution the officer using excessive force to stop. *Abdullahi v. City of Madison*, 423 F.3d 763, 774 (7th Cir. 2005) (*citing Yang v. Hardin*, 37 F.3d 282 (7th Cir. 1994)).

In *Lanigan v. Village of East Hazel Crest*, a plaintiff alleged that an officer violently poked and pushed him while the defendant officer "exhibited no desire to exert any supervision." 110 F.3d 467, 470 (7th Cir. 1997). The Seventh Circuit held that the defendant officer did not have a realistic opportunity to intervene the other officer's use of excessive force. *Id*. at 478. The alleged conduct by the other officer toward the plaintiff was not "so prolonged that [the defendant officer] could know or be deliberately indifferent to [the other officer's] actions. *Id*. Further, the court reasoned that the defendant officer did not have to throw himself between the other officer and plaintiff to avoid liability. *Id*.

Similarly, in *Smith v. Boyle*, the plaintiff alleged that the defendant officers "violated his constitutional rights by failing to intervene when [the excessive force officer] allegedly pushed [the plaintiff] into the door." No. 02 C 2788, 2004 WL 2203438 at * 4 (N.D. Ill. Sept. 29, 2004) (Anderson, J.) The court granted summary judgment in favor of the defendant officers. *Id*. It reasoned that the push by the excessive force officer happened suddenly and there is no evidence that the defendant officers had a realistic chance to intervene. *Id*.

In this case, Plaintiff alleges that after he made the statement about skating his butt out of the apartment building, Defendant Ricciardi abruptly grabbed his left arm and swung him into the wall. (Def.'s 56.1 ¶¶ 38, 39). When this happened, Defendant Lugo was on the right side of Plaintiff. (Def.'s 56.1 ¶ 42). No force was alleged against Defendant Lugo, and no other force was alleged against Defendant Ricciardi. (Def.'s 56.1 ¶¶ 44, 45). According to *Lanigan*, Defendant Officer Lugo was not required to jump in between Defendant Officer Ricciardi and Plaintiff in order to avoid liability. Moreover, it was not a realistic possibility for Defendant Officer Lugo to stop the discrete force alleged. Like the excessive force alleged in *Lanigan* and *Smith,* the force Defendant Ricciardi allegedly used was sudden and over in a split-second. (Def.'s 56.1 ¶ 39). Further, Defendant Officer Lugo was on the opposite side of Defendant Officer Ricciardi, and was not capable of stopping the alleged force because of his physical location. (Def.'s 56.1 ¶ 42). Therefore, summary judgment on Plaintiff's failure to intervene claim against Defendant Lugo should be granted. Alternatively, Defendant Lugo should be entitled to qualified immunity on the failure to intervene claim based on the holdings of *Lanigan* and *Smith*.

III. PLAINTIFF'S MALICIOUS PROSECUTION CLAIM FAILS AS A MATTER OF LAW.

To establish a claim of malicious prosecution under Illinois law, a plaintiff must prove: "(1) the commencement or continuance of judicial proceedings by the defendant against the plaintiff; (2) a lack of probable cause for those proceedings; (3) malice in instituting the proceedings; (4) termination of the proceedings in the plaintiff's favor; and (5) damages resulting to the plaintiff." *Mosley v. City of Chicago*, 614 F.3d 391, 399 (7th Cir. 2010). A plaintiff must show each one of these elements to establish a malicious prosecution claim. *Swick v. Liautaud,* 169 Ill.2d 504, 512, 215 Ill.Dec. 98, 662 N.E.2d 1238. If the absence of any one of these essential elements is established to the point that it may fairly be said that no genuine issue of material fact exists as to its absence, summary judgment in defendant's favor is appropriate. *Joiner v. Benton Community Bank*, 411 N.E.2d 229, 232 (Ill. 1980).

A. Plaintiff Concedes No Malicious Prosecution Claim Based on Plaintiff's Criminal Trespass Charge.

As demonstrated above, there was probable cause to arrest Plaintiff for criminally trespassing on Mr. Fouts' property. *See supra*, Part I. Plaintiff has not alleged that he was maliciously prosecuted for criminal trespass. (Def.'s 56.1 ¶ 50). The probable cause to arrest Plaintiff for criminal trespass also bars a malicious prosecution claim based on that charge. *See Holmes v. Village of Hoffman Estates*, 511 F.3d 673, 681-82 (7th Cir. 2007).

B. Additionally, Plaintiff Cannot Establish that the Criminal Charges Were Terminated in a Manner Indicative of Innocence.

Defendants are also entitled to summary judgment for Plaintiff's malicious prosecution claim based Plaintiff's criminal trespass and resisting a peace officer charges because the criminal charges were not dismissed in a manner indicative of innocence. (Def.'s 56.1 ¶¶ 48-52). "Plaintiffs bear the burden of proving the termination of their criminal case was for reasons consistent with their innocence." *O'Neill*, 2002 WL 31133188 at * 9 (*citing Swick,* 169 Ill.2d at 513-14, 662 N.E.2d 1243).

In *O'Neill*, the plaintiffs appeared in court on criminal trespassing charges. *Id.* When the case was called the Assistant State's Attorney stated '"[c]omplaining witness is not in court. Motion State SOL." *Id.* The court found that the plaintiffs "failed to produce any evidence from which it may be inferred that their cases were dismissed because of lack of probable cause." *Id.* at * 9. The court reasoned that the state court did not hear any "evidence about probable cause or lack of reasonable grounds to pursue the criminal action;" therefore, there is "nothing about the circumstance of the dismissal to establish they were indicative of innocence." *Id.* It further reasoned that it appeared that the plaintiffs' cases were dismissed solely because the complaining witness did not appear in court. *Id.*

Additionally, with regard to the favorable termination prong under Illinois law, the dismissal of criminal charges based on a motion SOL is not a termination in the plaintiff's favor indicative of innocence. *See Ferguson v. City of Chicago*, 213 Ill.2d 94, 101, 289 Ill.Dec. 679, 684,820 N.E.2d 455, 460 (Ill. 2004). In fact, "where a case is stricken with leave to reinstate, the matter remains undisposed of." *Id*. at 459.

Like the plaintiff in *O'Neill*, Plaintiff's resisting a peace officer charge was stricken with leave to reinstate. (Def.'s 56.1 ¶ 50). The Assistant State's Attorney who prosecuted Plaintiff's case agreed that the dismissal of Plaintiff's case was not indicative of his innocence. (Def.'s 56.1 ¶ 52). It is settled law in Illinois that a charge dismissed on a motion SOL is not indicative of Plaintiff's innocence. *See Ferguson*, 213 Ill.2d at 459. Therefore, summary judgment should be granted in favor of Defendant Officer Ricciardi on Plaintiff's malicious prosecution claim.

Based on the fact there Plaintiff does not have an underlying state claim, summary judgments should be granted in favor of Defendant City on Plaintiff Respondeat Superior claim.

CONCLUSION

For the reasons stated above, Defendants Vito Ricciardi, Benito Lugo, and the City of Chicago, respectfully request that this Honorable Court grant their motion for partial summary judgment on Counts I, II, V, and VI and grant any other relief this Court deems appropriate.

Respectfully submitted,

s/Helena B. Wright_____
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